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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 191

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1932
CERTIORARI GRANTED OCTOBER 10, 1932

(36888)

SUPREME COURT OF THE UNITED STATES

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. ANTHONY SAVAGE and TOM DEWOLFE, Attorneys for Appellant, 310 Federal Building, Seattle, Washington.

Mr. LESTER E. POPE, Attorney for Appellant, 800 Liggett Building, Seattle, Washington.

Messrs. CHADWICK & CHADWICK, and Mr. ORVILLE H. MILLS, Attorneys for Appellee, 660 Central Building, Seattle, Washington. [1*]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 20032

CLARENCE P. ARZNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

Plaintiff complains of the defendant, and for his cause of action alleges:

I.

That plaintiff is a resident of the above named judicial district of the United States, to-wit, the Western District of Washington, Northern Division, residing at Seattle, Washington.

*Page number appearing at the foot of page of original certified Transcript of Record.

II.

That on or about the 29th day of March, 1918, plaintiff enlisted in the 91st Division, Company "C", 316th Engineers of the United States Army at Camp Lewis, Washington; that thereafter he served in the above division, and was honorably discharged from said Army on the 16th day of January, 1919, at Camp Dodge, Iowa.

That immediately after entering said Army plaintiff applied for a policy of War Risk Insurance in the sum of ten thousand ($10,000) dollars, and thereafter there was deducted from his monthly pay a premium for said insurance. That a certificate of War Risk Insurance was duly issued, by the terms whereof the defendant agreed to pay the plaintiff the sum of [2] fifty-seven & 50/100 ($57.50) dollars per month in the event he suffered total and permanent disability, but that said policy was never delivered to the plaintiff; that said policy was kept in full force and effect until on or about the 16th day of January, 1919.

III.

That in the month of September, 1918, the plaintiff was shell-shocked in the Argonne Sector, as a result of which he developed psychoneurosis neurasthenia with hysterical manifestations; that he has had at all times since said date a general nervousness, insomnia, muscle jerking and twitchings, and facial spasms; that at all times since September, 1918, he has suffered from said afflictions and disabilities; that plaintiff has been informed and believes, and therefore alleges as true, that the afore-

said diseases and disabilities are permanent in their nature, and that he will never recover therefrom.

IV.

That by reason of the foregoing plaintiff, prior to his discharge from the Army, and while his insurance was still in full force and effect, became permanently and totally disabled from following any steady or gainful occupation, and has been informed and believes, and therefore alleges as true, that he will always be so disabled, and will never again be able to follow any substantially gainful occupation; by reason whereof the plaintiff became entitled to receive from the defendant the sum of fifty-seven & 50/100 ($57.50) dollars a month from and after September, 1918 [3]

V.

That plaintiff has made due proof of said disabilities and demanded the aforesaid payments, but that defendant has disagreed with him as to his claims and disabilities, and has refused to pay the same to him, or any part thereof.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of fifty-seven & 50/100 ($57.50) dollars per month, commencing with the month of September, 1918, until rendition of verdict herein, together with his costs and disbursements herein.

STEPHEN F. CHADWICK,
THEODORE D. CARLSON,
Attorneys for Plaintiff.

Office and Postoffice Address:
448 Central Building, Seattle, Wash. [4]

State of Washington,
County of King—ss.

Clarence P. Arzner, being first duly sworn, on oath deposes and says: That he is the plaintiff in the within entitled action, that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

CLARENCE P. ARZNER

Subscribed and sworn to before me this 20 day of December, 1928.

[Seal] THEODORE D. CARLSON,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Mar. 5, 1929. [5]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans Bureau, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

For answer to paragraph I of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

II.

For answer to paragraph II of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

III.

For answer to paragraph III of plaintiff's complaint, defendant denies each, every and singular the [6] allegations therein contained.

IV.

For answer to paragraph IV of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

V.

For answer to paragraph V of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained, with the exception that it is admitted a disagreement exists between the plaintiff and defendant herein.

For a FURTHER ANSWER and by way of a FIRST AFFIRMATIVE DEFENSE, defendant doth allege as follows:

I.

That on June 25, 1918, the plaintiff applied for and was granted War Risk Insurance in the amount of $10,000, payable in monthly installments of $57.50 each in the event of his death or permanent and total disability; that premiums on this term insurance contract were paid to include January, 1919; that the contract lapsed for failure to pay the premium due February 1, 1919; that effective

March 1, 1920, the plaintiff reinstated and converted his original $10,000 term insurance to an ordinary life contract upon which he paid premiums to include February, 1921; that on February 28, 1921, the plaintiff requested that his $10,000 ordinary life policy be reduced to a $5000 ordinary life policy effective March 1, 1921; that he also requested that he be paid the cash surrender value for the $5000 of the insurance which he discontinued; that a check for [7] $45.20, representing the cash surrender value, was forwarded to the plaintiff on April 29, 1921; that thereafter the plaintiff demanded the cash surrender value on the remaining $5000 ordinary life policy and a check for $18.30, representing the cash surrender value of this policy, was mailed to the insured on December 29, 1921; that the reinstatement of the $10,000 term insurance and the conversion of the same to an ordinary life policy issued effective March 1st, 1920, constituted a merger and novation of the original term insurance contract to the ordinary life policy, and all rights under the original insurance contract became and were merged in the ordinary life policy, which has been surrendered for its cash surrender value.

For a FURTHER ANSWER, and by way of a SECOND AFFIRMATIVE DEFENSE, defendant alleges as follows:

I.

The allegations of the first affirmative defense are expressly referred to in this second affirmative defense and incorporated herein by reference the

same as if said allegations were pleaded and set forth in this second affirmative defense verbatim; that when plaintiff applied for reinstatement of his term insurance and for the conversion of the same, as pleaded herein, he represented to the defendant that he was not then permanently and totally disabled; that plaintiff is now therefore, estopped from claiming permanent and total disability at or prior to the time of the reinstatement and conversion pleaded herein. [8]

WHEREFORE, having fully answered the complaint of the plaintiff herein, defendant prays that the same be dismissed with prejudice, and that the defendant may go hence with its costs and disbursements herein to be taxed according to law.

ANTHONY SAVAGE,
United States Attorney.
TOM De WOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans Bureau.

United States of America,
Western District of Washington,
Northern Division—ss.

Tom De Wolfe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, defend-

ant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

TOM De WOLFE.

Subscribed and sworn to before me this 30th day of April, 1929.

[Seal] T. W. EGGER,

Deputy Clerk, United States District Court, Western District of Washington. [9]

Received a copy of the within Answer this 30 day of April, 1929.

S. F. CHADWICK,
T. D. CARLSON,
Attorney for Pltf.

[Endorsed]: Filed May 1, 1929. [10]

(Title of Court and Cause.)

REPLY.

Comes now the plaintiff, and replying to the affirmative defenses set forth in the answer herein, admits, denies and alleges as follows:

I.

Replying to paragraph I of the first affirmative defense, plaintiff admits the contract of insurance of June 25, 1918, and that premiums were paid thereon to include January, 1919, but denies that said contract of insurance of June 25, 1918, lapsed for failure to pay premium due February 1, 1919;

and affirmatively alleges that said contract was at said time matured as in his said complaint set forth.

Plaintiff admits that on or about March 1, 1920, this plaintiff then being a ward of the defendant and receiving compensation and training because of his war-time service disability, and in ignorance and mistake of fact as to his rights, and at the solicitation and urging of defendant's agents, signed documents, the exact nature thereof being to plaintiff unknown, and that until February, 1921, plaintiff made payments to the defendant because thereof at which time, being unable to meet said payments because of his physical condition as set forth in the complaint herein, defendant through its agents [11] arranged for a reduction thereof, the exact nature of which is to plaintiff unknown, and that defendant unable to meet the payments requested and arranged for by defendant's agents, said agents arranged for a return of some of the sums theretofore paid by plaintiff to defendant, the exact amount thereof being to plaintiff unknown.

Plaintiff further denies each and every other allegation in said first affirmative defense contained.

II.

Replying to paragraph I of the second affirmative defense, plaintiff repeats his reply to the allegations of the first affirmative defense, and incorporates the same herein by reference, and denies each and every other further allegation in said second affirmative defense contained.

WHEREFORE, having fully replied, plaintiff prays as in his complaint herein.

STEPHEN F. CHADWICK and
THEODORE D. CARLSON,
Attorneys for Plaintiff. [12]

United States of America,
State of Washington,
County of King.—ss.

Clarence P. Arzner, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing reply, knows the contents thereof and that the same is true as he verily believes.

CLARENCE P. ARZNER.

Subscribed and sworn to before me this 11th day of May, 1929.

(Seal) M. D. MATTHEWS,
Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the within Reply this 18 day of May, 1929.

ANTHONY SAVAGE
Attorney for Pltf.

[Endorsed]: Filed May 21, 1929. [13]

(Title of Court and Cause.)

TRIAL.

Now on this 3rd day of June, 1931, S. F. Chadwick, Esq., and Orville H. Mills, Esq., appearing as counsel for the plaintiff and Tom DeWolfe, Assistant United States District Attorney, and L. E. Pope, Legal Advisor of the United States Veterans' Bureau, appearing for the defendant, this cause is called for trial at 2:15 P. M. with both sides being ready. A jury is impanelled and sworn as follows: Mrs. Lois J. Thompson, J. H. Bradley, E. B. Snyder, Frank Hart, J. M. Ausman, H. D. Carlson, G. E. Olson, A. E. Tanson, Sarah H. Shull, Ira W. Minnihan, W. B. Cochrane, and Fred Jamieson. The plaintiff's witnesses are present and are sworn in a group. Admitted facts are admitted in the record and opening statements are made to the jury by counsel f r both sides. Witnesses testifying for the plaintiff under oath are as follows: Clarence P. Arzner, Dr. Donald A. Nicholson. The plaintiff's exhibits numbered 1 and 2 are admitted in evidence. The defendant's exhibits numbered A-1, A-2, A-3 and A-4 are identified and denied as being part of the defense. Exhibit numbered A-5 is identified. The jury is admonished at 4:60 P. M. and the trial is ordered continued to 10 A. M. tomorrow.

Journal No. 19 at Page 395. [14]

(Title of Court and Cause.)

TRIAL RESUMED.

Now on this 24th day of June, 1931, trial of the above entitled cause is resumed pursuant to adjournment with all jurors and parties present. Witnesses testifying for the plaintiff under oath are as follows: Dr. F. G. Nichols, Norman W. Engle, J. J. Bonnell, Wade Waters, Walter B. Mason, J. S. Christy, and Wilmer Arzner. The defendant's exhibits numbered A-6 to A-13, inclusive, are admitted in evidence. The plaintiff rests at 11:45 A.M. and the jury is admonished and excused until 2 P.M. while a question of law is argued as to the plaintiff's right to sue. Recess is taken until 2 P.M., at which time all jurors and parties being present the trial is resumed. The defendant now moves for a non-suit on grounds stated in the stenographic record, and the court overrules the same on all grounds except the third named, the plaintiff's right to sue, on which further arguments are heard, and the motion then overruled in its entirety, and an exception noted. Witnesses for the defendant testifying under oath are as follows: Dr. W. D. Lundsford, Dr. G. I. Birchfield, H. B. Flanders, C. J. Johnston, Thad McGlinn, Wm. N. Schlax. The defendant's exhibits numbered A-1 to A-5, inclusive, are now offered and admitted in evidence. The deposition of John Coolin is published and read to the jury. The deposition of Lorentz H. Stenvig is now published and

it being 4:35 P.M. the reading is deferred until 10 A.M. tomorrow at which time the trial will be resumed.

Journal No. 19 at Page 407 [15]

(Title of Court and Cause.)

Now on this 25th day of June, 1931, trial of the above entitled cause is resumed pursuant to adjournment with all jurors and parties present. Witnesses testifying under oath for the defendant are as follows: Dr. Lawrence R. Quilliam, C. R. Christy, Stenvig deposition is read to the jury. The defendant's exhibits numbered A-14, A-15, A-16 are admitted in evidence. The plaintiff's exhibit numbered 3 is admitted in evidence. Exhibit numbered 4 is denied. The defendant rests. Rebuttal witnesses are as follows: Clarence P. Arzner. Both sides rest at 11:30 A.M. Counsel for the defendant moves for a directed verdict on the same grounds urged on its motion for a nonsuit. The same is denied and separate exception is noted as to each separate ground of the motion. Arguments of counsel are begun and at 11:43 A.M. recess is had to 1:30 P.M., at which time all jurors and parties are present and the trial is resumed and arguments are concluded. The jury is instructed. No Exceptions. Whereupon the jury retires at 2:50 P.M. in charge of bailiffs to deliberate of a verdict. At 4:35 P.M. the bailiffs are instructed that if a ver-

dict is agreed upon before 6 P.M. it is to be sealed and returned into court by the foreman at 10 A.M. tomorrow. If a verdict is not agreed upon before 6 P.M. the jurors are to be allowed to separate and go to their homes and resume their deliberation at 9 A.M. tomorrow.

Journal No. 19 at Page 412. [16]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find for the Plaintiff, and that he became totally and permanently disabled on the 29 day of September, 1918.

W. B. COCHRANE,
Foreman.

[Endorsed]: Filed Jun 26, 1931. [17]

(Title of Court and Cause.)

TRIAL RESUMED.

(Order extending Time for Lodging Bill of Exceptions)

Now on this 26th day of June, 1931, at the incoming of court at 10 A.M. the jury returns into court with a sealed verdict which is as follows, to-wit: "We, the jury in the above-entitled cause, find for the Plaintiff, and that he became totally

and permanently disabled on the 29 day of September, 1918. W. B. Cochrane, Foreman." Roll call of the jury shows all present. The verdict is received, read, acknowledged by the jury and ordered filed. The jury is excused from the cause and until 10 A.M. next Tuesday. The defendant is given ninety (90) days in which to lodge proposed bill of exceptions. [18]

United States District Court, Western District of Washington, Northern Division.

No. 20032

CLARENCE P. ARZNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above entitled cause having come on regularly for trial on the 24th day of June, 1931, before the Honorable Colin Neblett, one of the judges of the above entitled court and plaintiff appearing in person and by his attorneys Chadwick and Chadwick, and defendants, United States of America by its attorneys Tom De Wolfe and Lester E. Pope, regional attorney for the United States Veterans' Bureau, and a jury of twelve persons having been

duly and regularly impanelled and sworn to try the said cause, and witnesses on the part of plaintiff and on the part of defendant having been sworn and examined and evidence being duly introduced by the plaintiff and by the defendant and the attorneys for the plaintiff and the defendant having made their arguments after the hearing of the evidence and the court having instructed the jury as to the law and the jury having duly considered the evidence and the court's instructions, the jury retired to consider their verdict and subsequently returned into the court upon the 26th day of June, 1931, with their verdict signed by the foreman and the jury being called, answered to their names and said that they found a verdict in favor of the plaintiff and against the defendant, finding that the plaintiff became totally and permanently disabled on the 29th day of September, 1918. [19]

Now, therefore, it is ORDERED, ADJUDGED and DECREED that the plaintiff have and recover of and from the defendant United States of America, the monthly installments of insurance payable under the contract of War Risk Insurance issued by said defendant to the plaintiff, as remaining unpaid upon the 26th day of June, 1931, being the time of the rendition of the verdict herein, to-wit: the sum of $8797.50.

It is further ORDERED, ADJUDGED and DECREED that Stephen F. Chadwick is entitled on behalf of the attorneys for the plaintiff to receive from said judgment as a reasonable attorneys fee for the services of the attorneys for the plain-

tiff in the above entitled cause a sum equal to 10 per cent of the aforesaid sum of $8797.50, together with 10 per cent of each of the additional monthly installments of $57.50 to be paid under or in consequence of this judgment, said fee to be paid by the United States Veterans' Bureau out of the payments to be made and as they are made under or in consequence of this judgment, said payments to be made as by law in such cases provided.

To all of which defendant excepts and its exception is allowed.

Done in open court this 30th day of June, 1931.

COLIN NEBLETT,
Judge.

Presented by
CHADWICK & CHADWICK,
By ORVILLE H. MILLS.

Received a copy of the within Judgment this 30 day of June, 1931.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jun 30, 1931. [20]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said

District, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, and petitions the above Court for an order granting a new trial in the above entitled cause, for the following reasons, to wit:

1. Error in law occurring at the trial and duly excepted to by the defendant.

2. Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Regional Attorney United States Veterans Bureau.

Received a copy of the within Motion this 23 day of July, 1931.

CHADWICK & CHADWICK,
ORVILLE H. MILLS,
By F. A. L.
Attorneys for

[Endorsed]: Filed Jul. 23, 1931. [21]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL.

The defendant in the above entitled action, having filed herein a motion for a new trial,

Now, therefore, it is ORDERED, that the motion of the defendant for a new trial herein be denied, to which ruling defendant excepts and its exception is hereby allowed.

Done in open court this 31st day of August, 1931.

COLIN NEBLETT,
Judge.

Presented by
CHADWICK & CHADWICK,
By ORVILLE H. MILLS.

O.K. as to form.
TOM DeWOLFE,
Asst. U. S. Atty.

Received a copy of the within Order this 27 day of Aug., 1931.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Sep. 8, 1931. [22]

(Title of Court and Cause.)

STIPULATION.

It is hereby STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 25th day

of October, 1931, in which to lodge and have settled its proposed Bill of Exceptions herein.

Dated this 4th day of September, 1931.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
CHADWICK & CHADWICK,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 16, 1931. [23]

(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby ORDERED that defendant herein may have up to and including the 25th day of October, 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

DONE IN OPEN COURT this 17th day of September, 1931.

COLIN NEBLETT,
United States District Judge.

Approved:

S. E. CHADWICK,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 16, 1931. [24]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The defendant, the United States of America, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 30th day of June, 1931, does hereby appeal from the said order, judgment and decree, and each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Petition this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [25]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To CLARENCE P. ARZNER, Plaintiff, and CHADWICK and CHADWICK, Attorneys for Plaintiff:

YOU, AND EACH OF YOU, will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on June 30, 1931, and that the certified transcript of record will be filed in the said appellate Court within thirty (30) days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Notice this 29 day of Sept., 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [26]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Insurance Attorney, Veterans Administration, United States Veterans Bureau, and in connection with its notice of appeal herein and petition for appeal herein, assigns the following errors which it avers occurred at the trial of said cause which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying the motion of the defendant for a nonsuit on the following grounds:

1. That the evidence is insufficient to establish a prima facie case and is legally insufficient to sustain a verdict.

2. That the evidence affirmatively shows that the plaintiff was not permanently and totally disabled while the contract of insurance was in force and effect.

3. That the plaintiff having reinstated and converted the entire $10,000.00 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire converted policy and accepting its cash sur- [27] render value, is not in a position to comply with the statute by sur-

render of the new contracts and, therefore, is precluded from recovering upon his term insurance policy.

II.

The District Court erred in denying the motion of the defendant for a directed verdict interposed by the defendant at the end of the entire testimony herein which motion was based upon the same grounds and reasons as the motion for a nonsuit herein to which denial the defendant excepted timely at the trial herein.

III.

The District Court erred in entering judgment upon the verdict herein when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment herein.

IV.

The District Court erred in denying the defendant's motion for new trial.

V.

The District Court erred in entering judgment on plaintiff's term insurance when plaintiff was unable to surrender his converted life insurance contract in compliance with the World War Veterans Act, as amended.

VI.

The District Court erred in entering judgment herein on plaintiff's term insurance contract when the plaintiff had failed and refused to make a tender of refund of the cash surrender value of the con-

verted life insurance contracts which cash surrender value was paid the plaintiff herein by the defendant.

VII.

The District Court erred in entering judgment [28] herein against the defendant on plaintiff's term insurance contract without setting off against said recovery and said judgment the amount of the cash surrender value which plaintiff received from defendant as the cash surrender value of his converted life insurance contracts.

VIII.

The District Court erred in entering judgment herein for the plaintiff and against the defendant on plaintiff's term insurance contract when the plaintiff was unable to comply with the World War Veterans Act, as amended, by surrendering his converted contract as a condition precedent to recovery on the term insurance contract.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Assignment of Errors this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [29]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Upon the application of the defendant, United States of America, it is hereby

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 30th day of June, 1931, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 28th day of September, 1931.

EDWARD E. CUSHMAN,
United States District Judge.

O.K. as to form:
CHADWICK & CHADWICK,
Attorneys for Plaintiff.

Received a copy of the within order this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Filed Sep 29, 1931. [30]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED between the parties to the above entitled action by and through

their respective attorneys of record that the defendant may and hereby does waive on appeal herein any and all assignments of error dealing with the insufficiency of the evidence to warrant the submission of the cause to the jury as regards the testimony adduced herein by plaintiff and his witnesses as to his physical condition and whether he was permanently and totally disabled during the time his $10,000.00 term insurance contract was in effect.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.
Attorneys for defendant.
STEPHEN J. & STEPHEN F. CHADWICK,
Attorneys for plaintiff.

Received a copy of the within stipulation this 3d day of Oct. 1931.

CHADWICK & CHADWICK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 3, 1931. [31]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action by and

through their respective counsel that the original exhibits of both parties admitted in evidence herein may be sent to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in lieu of certified copies of said exhibits being so transmitted.

Dated at Seattle, Washington, this 3rd day of October, 1931.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.
Attorneys for defendant.
CHADWICK & CHADWICK,
Attorneys for plaintiff.

Received a copy of the within Stipulation this 3rd day of Oct. 1931.

CHADWICK & CHADWICK,
Attorneys for plaintiff.

[Endorsed]: Filed Oct 10, 1931. [32]

(Title of Court and Cause.)

ORDER

Upon stipulation of the parties to the above entitled action and the Court being duly advised in the premises, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Clerk of the above entitled Court be and he hereby is ordered to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the original exhibits herein which were admitted in evidence on behalf of both parties in lieu of certified copies of said exhibits being transmitted said original exhibits of plaintiff being numbered 1, 2 and 3, and said original exhibits of defendant being numbered A-1 to A-16, inclusive.

Done this 10th day of October, 1931.

EDWARD E. CUSHMAN,
United States District Judge.

O.K. Form
CHADWICK & CHADWICK.

[Endorsed]: Filed Oct 10, 1931. [33]

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled cause came on regularly for trial on June 23, 1931, at two o'clock P.M. before the Honorable Colin Neblett, one of the judges of the above entitled Court, sitting with a jury, in the south courtroom of the Federal Building, Seattle, Washington, the plaintiff appearing in person and by his attorneys, Messrs. Chadwick and Chadwick and Mr.

Orville H. Mills, the defendant appearing by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Insurance Attorney, Veterans Administration, United States Veterans Bureau, its attorneys and counsel;

WHEREUPON, a jury having been empaneled and sworn, and opening statements having been made by counsel for the plaintiff and for the defendant, the following proceedings were had and testimony taken, to wit:

The COURT. What are the admitted facts in this case?

Mr. POPE. It is admitted that the plaintiff enlisted on or about March 29, 1919.

It is also admitted that the plaintiff was discharged on January 16, 1919. [34]

It is admitted that while in service the plaintiff applied for and was granted $10,000.00 War Risk Insurance, on which premiums were paid to include the month of January 1919.

It is the Government's contention no further premiums were paid on the policy of insurance after that time—is that admitted by the plaintiff?

Mr. MILLS. We admit there were no premiums paid on the policy of insurance after January 1st—

Mr. POPE. (Interrupting) And, effective, March 1, 1920, the plaintiff reinstated his insurance, the original $10,000.00 insurance and converted it to an ordinary life policy, upon which premiums were then paid to include February 1921. On February

(Testimony of Clarence P. Arzner.)

28, 1921, the plaintiff surrendered $5,000.00 of that ordinary life insurance and accepted the cash surrender value of $45.20. Thereafter, on or about the latter part of 1921, the plaintiff surrendered the remaining $5,000.00 of ordinary life insurance on or about December 29, 1921, and accepted the cash surrender value of that remaining policy of that $5,000.00.

Is that admitted?

Mr. MILLS. Our reply is certain negotiations took place at that time between the insured and the government, the exact nature of which is not known to the plaintiff at this time.

The COURT. The disagreement is admitted, is it?

Mr. DeWOLFE. Yes, Your Honor, it is admitted.

The COURT. Proceed.

CLARENCE P. ARZNER, being first duly sworn on oath, testified in part as follows, on cross-examination:

That is my signature on Defendant's Exhibit A-2, more particularly the application for insurance which was the application under date of April 16, 1918. I think it is my signature on the application for insurance which is a part of Defendant's Exhibit A-2 under date of June 25, 1918 and also I think it is my signature on the application "Person

(Testimony of Clarence P. Arzner.)

Disabled in the Service" which is a part of and attached to Defendant's Exhibit A-2. That is my signature on Defendant's Exhibit A-2 which is the application for reinstatement of war risk insurance dated March 1, 1920. In regard to the document which is a part of Defendant's Exhibit A-2 headed "Release Receipt" dated the 2d of November, 1921, I will say that is my signature thereon. Also that is my signature on the release receipt which is attached to and made a part of Defendant's Exhibit A-2 and which is dated April 5, 1921. Those are my signatures on Defendant's Exhibit A-1 and on the check dated April 29, 1921 and numbered 929975 for the sum of $45.20 payable to Clarence Phillip Arzner, and that is my signature on check dated December 29, 1921 on the Treasury of the United States numbered 3169671 in the sum of $18.30 payable to the order of Clarence Phillip Arzner. Those are my endorsements thereon. That is my signature on Defendant's Exhibit A-4 and my signature is on the document attached to and made a part thereof headed "Application for Conversion of Government War Risk Insurance". That is my signature on the letter under date of February 28, 1921 which is attached to and made a part of Defendant's Exhibit A-4. It looks like my signature on Defendant's Exhibit A-3 and especially on the report of physical examination of enlisted man prior to separation from the service of the United States Army. [36]

(Testimony of Clarence P. Arzner.)

I paid no premiums on my insurance after I got out of service in January, 1919. On or about March 1, 1920 the Veterans Bureau requested me to make an application for the reinstatement of my $10,000.00 insurance and I signed the application. I signed an application for conversion of the reinstated insurance into an ordinary life policy. I signed that stuff. I didn't know what I was signing. About February 1921 I requested that I be paid the cash surrender value of $5,000.00 for my policy and that it be reduced to $5,000.00. I received some money as a cash surrender value for the first $5,000.00 converted insurance. Then the latter part of 1921 I surrendered the other $5,000.00 converted insurance and received cash for it and did not pay any more premiums on it. I did pay the premiums on the $10,000.00 policy between the time I took it out, about March 1, 1920, and 1921, when I surrendered it for cash.

Mr. POPE. We would like to make a motion to be heard on a point of law. You might as well just excuse the jury until this afternoon.

The COURT. What is the proposition?

Mr. POPE. A proposition of law under the decision of the 10th Circuit, holding where there is a subsequent policy and a man is surrendered the cash surrender value, he simply cannot meet the provision of the statute and cannot recover.

The COURT. Why wasn't that decided before the case went to trial?

(Testimony of Clarence P. Arzner.)

Mr. POPE. Affirmative matter, it was plead but of course we had to get the definite evidence here that it was, the policy was cancelled and we did not see how it could be done except to bring it out in the evidence of the [37] case. In other words, it is a question of fact as to the reinstatement and conversion and acceptance of the cash surrender value.

The COURT. Gentlemen and ladies, you may go until 2:00 o'clock. (Admonition) Jury retires.

(The following in the absence of the jury.)

Mr. CHADWICK. The matter counsel suggests is the matter I endeavored to suggest to the Court yesterday. We have met it by our reply, I believe —it is a matter to be determined upon the evidence, although an issue which the Court should then pass upon; nevertheless under the pleadings and issues as framed, this is not the time to consider or rather when the Government made their proof, and we have answered it by the reply which was filed to that affirmative matter.

Mr. DeWOLFE. I think counsel for the plaintiff has misconstrued the legal purport of the entire question involved. I think they are unfamiliar with that recent section of the Act passed last summer, which takes away from the government the defense of estoppel——

(Further argument.)

Mr. POPE. At the time, the government moves for a nonsuit on the ground (1) that the evidence is insufficient to establish a prima facie case and is legally insufficient to sustain a verdict; and (2) on

(Testimony of Clarence P. Arzner.)

the ground the evidence affirmatively shows that the man was not permanently and totally disabled while the contract of insurance was in force and effect; and (3) on the ground that the plaintiff having reinstated and converted the entire $10,000.00 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire [38] converted policy and accepting its cash surrender value, is not in a position to comply with the Statute and, therefore, is precluded from recovering upon his term insurance policy.

The COURT. The motion is overruled except as to the third ground. I will hear your argument on the third ground.

(Argument)

The COURT. There not being any decision in this Circuit on the question here to be decided, the decision of the Tenth Circuit does not bind the Court in the trial of this case.

I feel that I ought to decide the proposition as it appears to have been decided in my District from which the appeal was taken, and I cannot decide it otherwise.

I am not compelled to follow the Circuit Court of the Tenth Circuit. I think Judge Cotteral's idea of this statute is correct. I cannot see beyond any question why this boy should now return this policy, having once returned it, to comply with the statute. It is true he cancelled it and it is no longer in effect. He has already surrendered it.

(Testimony of C. R. Christie.)

There is no use for this court to demand his doing something which he has already done.

The motion will be overruled in its entirety.

Mr. DeWOLFE. Exception, please.

The COURT. Proceed for the defense.

Whereupon the defense proceeded with its case.

Whereupon defendant offered in evidence Defendant's Exhibits A-1 and A-2 which were certified copies of checks paid to plaintiff as the cash surrender value of his policy and copies of the application plaintiff made for compensation and application for reinstatement of his insurance and two receipts and releases receipting for the money received by plaintiff as cash surrender value on certain contracts [39] which exhibits were admitted in evidence and made a part of the record herein.

Defendant's Exhibit A-3 which is the service record of the plaintiff, was admitted in evidence and made a part of the record.

Defendant's Exhibit A-4 which was plaintiff's application for conversion of his government life insurance and which also consisted of a letter under date of February 28, 1921 concerning the surrender of his insurance, was admitted in evidence.

C. R. CHRISTIE, being first duly sworn on oath, testified as follows:

My name is C. R. Christie. I am employed by the United States Veterans Bureau as a co-operator.

(Testimony of C. R. Christie.)

I have been employed by the Bureau for ten years and am familiar with the records and files of the United States Veterans Bureau with reference to compensation and insurance matters. I have examined insurance records in this case. The records show that on or about March 1, 1920 the sum of $10,000.00 of plaintiff's war risk insurance was converted into an ordinary life policy.

At the end of all the testimony the following proceedings occurred:

Mr. POPE. The government, at this time, moves for a directed verdict on the same grounds and for the same reasons as set out in support of the government's motion for a non-suit, which was interposed at the end of the plaintiff's case.

The COURT. Motion denied.

Mr. POPE. May we have a separate exception to each of the three grounds to that motion? [40]

The COURT. Yes.

Proceed with the argument, gentlemen.

(Argument of counsel.)

The COURT. Ladies and gentlemen: This is a suit upon a policy of war risk insurance. It is a suit on a contract which was entered into between the United States Government and this plaintiff while he was in the military forces of the United States. This contract is different from the law under which a person receives compensation or pen-

sions or is hospitalized or any amount of money he might receive while he is being rehabilitated. They are based upon an entirely different law.

Now, in this case, it appears from the pleadings and evidence, after the lapse of this policy, upon which the suit is brought, that the same was reinstated by the plaintiff; that he then converted it into a regular life insurance policy; before that, the policy was what is known as "term insurance".

After he had converted it into regular life, he surrrendered his policy and took the cash value which the government paid him.

Now, his reinstatement and conversion is no concern of yours; you cannot consider it in this case; it is a matter of law; the Court determines that; the Court is responsible for the law; you decide the facts in this case from the evidence as introduced.

It is admitted in this case that the plaintiff in this case enlisted in the United States military forces on March 29, 1918; that he was discharged June 16, 1919.

Mr. POPE. January 16, 1919.

The COURT. January 16, 1919—that he applied for [41] insurance in the sum of Ten Thousand Dollars and was granted an insurance policy; that the premiums on this policy were paid for the month of January, 1919; that under the law, there is a period of grace to the end of the next month, in which the policy was kept in force. This policy was in force to midnight of the last day of February 1919.

This contract—the government undertook, in this contract—if the plaintiff died to pay him this policy or if he became totally and permanently disabled while the policy was in force and effect, that they would pay him so much per month as long as he lived; and, the plaintiff, on his part, agreed and undertook to pay the monthly installments required to be paid on this policy, to keep it in force.

With these admissions, gentlemen, there is only one issue in this case, an issue of fact, as submitted to you, that is, did the plaintiff become totally and permanently disabled while this policy of war risk insurance was in force and has that disability continued to the present time?

All the testimony introduced in this case is for the purpose of informing you so you might decide this one issue properly and correctly.

A total disability is defined as follows: Any impairment of mind or body which renders it impossible for the disabled person to continuously follow any substantially gainful occupation, shall be deemed to be a total disability. A total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain it will continue throughout the life of the person suffering from it. [42]

You have heard the evidence in this case, gentlemen. The evidence has consisted of laymen who have testified as to the condition of this plaintiff, as it appeared to them the various times they have seen him.

There have been witnesses introduced on behalf of the plaintiff, that testified as to his condition, that it appeared to them soon after the injury—soon after the time he complained he received the injury from the service, that is the shell shock; and, witnesses have testified seeing him various times since then up to the present time, as to his condition, as both witnesses for the prosecution and government witnesses for the defense testified to his physical condition as it appeared to them at various times since he was discharged from the Army.

Then, we have the testimony of the various doctors, some of them who examined him soon after his return from the army and his physical record during his military service, that is in evidence before you.

Now, this Doctor's testimony is of two kinds; most of these doctors, I think all of them, probably, except one—most of them, all of them, I believe examined him. They give their testimony as to what the condition they found him in at the various times he was examined. Of course, that is testimony before you to be considered in this case; then, some of the doctors were asked their opinion as to whether or not he was totally and permanently disabled. That is an opinion—what is known in the law as "expert evidence". It is not based on the examination or things that they know; they give their opinion on hypothetical questions, that is a certain hypothesis stated to the doctor and he gives

his opinion as such doctor as to whether or not it is [43] permanent and total disability. The value of his expert opinion or testimony rests upon two propositions; first, before you can consider this opinion testimony at all, you must, from the evidence, (the hypothesis stated in the question propounded to the doctor)—the hypothesis are true, because when those hypotheses are stated to the doctor to give his opinion on, he assumes that they are true; secondly, his opinion, the value of his opinion depends, and its weight, depends upon his experience in the line of the profession in which he testifies; that is, the opinion of a doctor who had been—also, on his knowledge and study, that is the opinion of the doctor who has made a profession of nervous diseases and has considerable experience in treating nervous patients and has made a study of that particular branch of his profession, which is of more weight than a doctor who was just a general practitioner and never made a specialty of that particular disease.

So, you will take his learning and experience into consideration, when you come to consider that opinion testimony and after such consideration, you may give it such weight as it deserved; if you think it doesn't carry any weight, you will reject it altogether.

Now, there has been considerable evidence in this case concerning the occupation and work done by the plaintiff since his discharge from the Army;

that testimony is introduced here for one purpose only, so that you can take it along with all the evidence in the case, in determining the physical condition of the plaintiff. It is not absolute—whether he worked or did not work, does not conclusively settle the matter as to whether he is totally or permanently disabled or not.

The question is, if he worked, whether or not it [44] was injurious to his health or would increase the severity of the disease that he was suffering from; and, in this connection, the Court instructs you as follows:

That a period of employment or record of having worked or having received wages or salary for some particular period of time, will not preclude the plaintiff from recovering upon the war risk insurance on the ground of total and permanent disability, if throughout such period of work or receipt of such wages, there existed some disease of disability which infringed upon a substantial or gainful employment or prevented him from pursuing or performing continuously such employment without interruption, because of his disability;

And, you are further instructed that work, engaged in at the expense of his health and at the risk of aggravating his disability is not continuous pursuit of gainful employment as to preclude recovery of the policy but if, at the time of said employment, he was then and at all times disabled from shell shock, as a result of which he developed psycho-

neurosis, neurasthenia, with hysterical manifestations and if he suffered from such a disease or condition as a result of shell shock, that throughout his employment his disease gradually or progressively became worse or aggravated or harmful for him, in his state of health, to pursue employment, these conditions would not amount to continuous pursuit of a substantially gainful occupation and, if you find that during the time the policy was in full force and effect, the plaintiff suffered from a disease rendering him at all times thereafter unfit to pursue a substantially gainful occupation, you will find for the plaintiff, irrespective of such employment, even though subsequent to the beginning date of permanent total disability. [45]

In this case, gentlemen, the issue that is submitted to you, the burden of proof rests upon the plaintiff; the defendant in this case denied that the plaintiff is totally and permanently disabled or was so at the time the policy of insurance was in force and it is incumbent upon the plaintiff to establish his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the evidence, but this is not determined solely by the greatest number of witnesses testifying with relation to a particular fact or state of facts. It means the testimony on the part of the party upon whom the burden must have the greatest weight, in your estimation having more convincing weight.

If, in your opinion, the testimony on any essential point is evenly balanced, then the party upon whom

the burden rests to prove same by a preponderance of the evidence, must be deemed to have failed in regard thereto.

It is your duty, gentlemen, to consider all of the evidence introduced in the case and you are the sole judges of the credibility of the witnesses and the weight you will give to their testimony. It is your duty to reconcile the testimony, if you can; that is to reach the conclusion which will permit the testimony of all the witnesses stand. (If that can be done) every witness is presumed to speak the truth until the contrary appears; the contrary may appear in a number of ways; one or more witnesses may testify to a state of facts and another one or more to a state of facts directly opposite; it is, then, for you to say which you believe; one witness may state, modify or explain facts testified to by another; this may arise be- [46] cause one had better means or knowledge about that which he testifies than the other.

I will give you the proper forms of verdict; as soon as you have agreed upon a verdict, you will have it signed by your foreman and return it to the Court.

The blank spaces are left in the forms the Court submits to you. If you find in favor of the plaintiff and against the defendant, you will insert the date when you found the defendant became totally and permanently disabled.

Are there any exceptions to the Court's instructions?

Mr. CHADWICK. No exceptions.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions may be settled, allowed, signed, and sealed by the Court and made a part of the record.

ANTHONY SAVAGE
United States Attorney
TOM DeWOLFE
Asst. United States Attorney
LESTER E. POPE
Insurance Attorney, Veterans Administration, United States Veterans Bureau

Received a copy of the within this 8th day of Oct. 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Lodged Oct. 8, 1931. [47]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

The above cause coming on for hearing on application of the defendant to settle the Bill of Exceptions in this cause, counsel for both parties appearing, and it appearing to the Court that said Bill of Exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same, together with exceptions thereto and all

of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions, and the parties hereto having stipulated and agreed upon said bill, the Court being duly advised, it is by the Court

ORDERED that said Bill of Exceptions be and it hereby is settled as a true Bill of Exceptions in said cause, which contains all the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit. [48]

IT IS FURTHER ORDERED that the Clerk of this Court attach all of the exhibits in this cause to said Bill of Exceptions, making the same a part hereof.

Dated this 13th day of October, 1931.

COLIN NEBLETT
United States District Judge

O. K.
CHADWICK & CHADWICK
Attorneys for plaintiff

Received a copy of the within bill exc— this 3rd day of October, 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Filed Oct. 19, 1931. [49]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare certified copies of the following papers in the above entitled cause and transmit same to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to comprise the transcript of record on appeal herein:

1. Complaint.
2. Answer.
3. Reply.
4. Trial record June 23, 1931
5. " " " 24, 1931
6. " " " 25, 1931
7. Verdict.
8. Order of June 26, 1931 granting deft. 90 days to lodge Bill of Exceptions.
9. Judgment signed by Court.
10. Motion for new trial.
11. Order of Sept. 8, 1931 denying motion for new trial.
12. Stipulation and Order filed Sept. 16, 1931 extending time for Bill of Exceptions to October 25, 1931.

13. Petition for appeal.
14. Notice of appeal. [50]
15. Order allowing appeal.
16. Assignment of Errors.
17. Citation on appeal.
18. Stipulation filed October 3, 1931 waiving assignment of error.
19. Stipulation and Order directing transmittal of original exhibits to Circuit Court of Appeals.
20. This praecipe.
21. Bill of Exceptions.

ANTHONY SAVAGE
United States Attorney
TOM DeWOLFE
Asst. United States Attorney

Copy Received this 9th day of Oct. 1931.
CHADWICK & CHADWICK
Attys for Pltf.

[Endorsed]: Filed Oct. 9, 1931. [51]

(Title of Court and Cause.)

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of

record, consisting of pages numbered from 1 to 51, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true, and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [52]

Clerk's fees, (Act of Feb. 11, 1925) for making record, certificate or return, 106 folios at 15¢ per folio,	$15.90
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record,	.50
Certificate of Clerk to Original Exhibits	.50
Total	$21.90

I further certify that the above cost of preparing and certifying record, amounting to $21.90 has not been paid to me for the reason that the United States Government is the Appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 22 day of October 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By T. W. EGGER,
Deputy. [53]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America
Western District of Washington.
Northern Division.—ss.

The PRESIDENT of the UNITED STATES OF AMERICA, to CLARENCE P. ARZNER, Plaintiff, and CHADWICK and CHADWICK, Attorneys for Plaintiff:

YOU, AND EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, within thirty days from date hereof, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final judgment signed and filed on the 30th

day of June, 1931, wherein the United States of America is defendant, and Clarence P. Arzner is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 28th day of September, 1931.

[Seal] EDWARD E. CUSHMAN
United States District Judge.

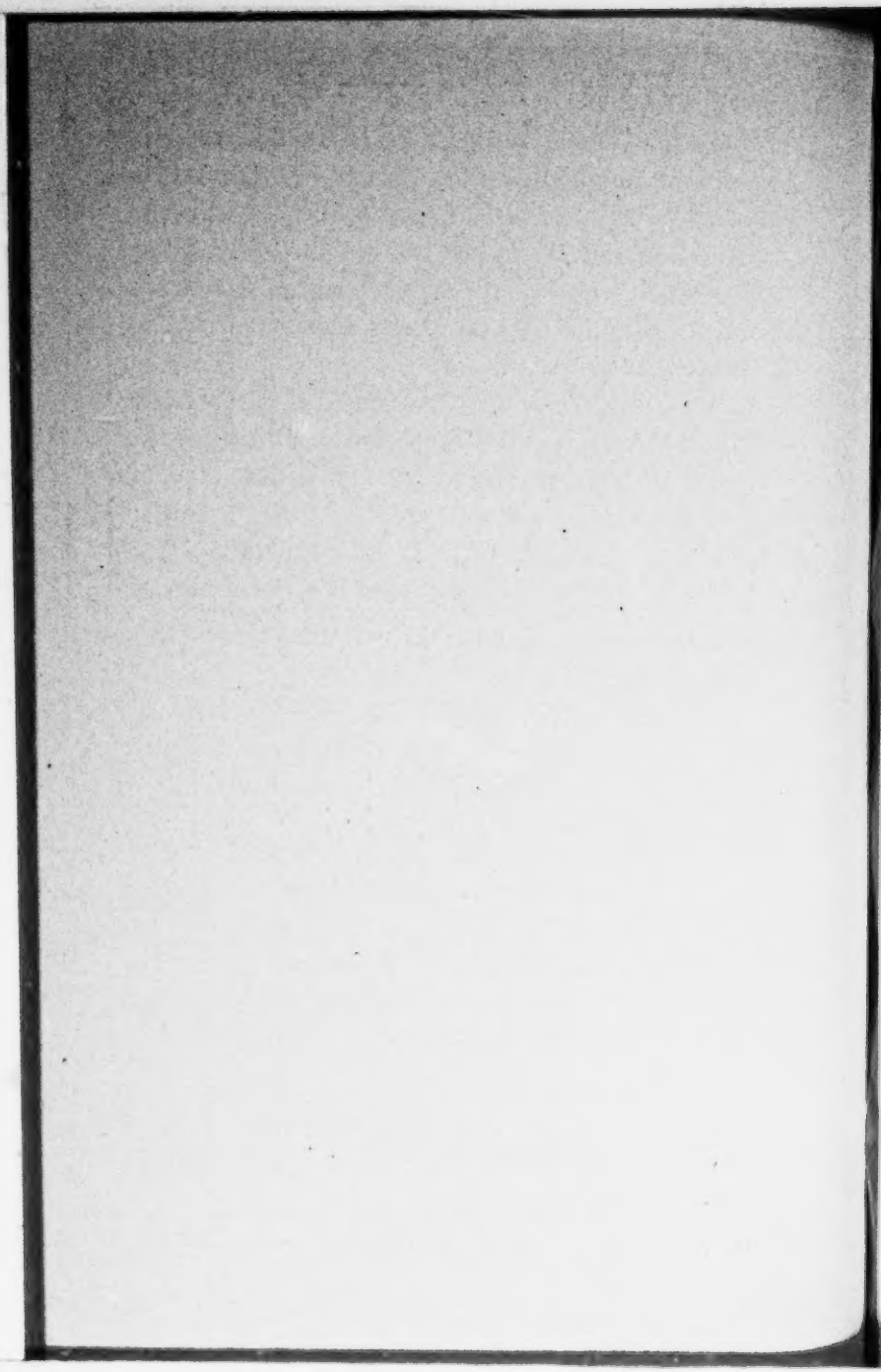
Received a copy of the within citation this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: No. 6643. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Clarence P. Arzner, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 26, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



52 [Omitted.]

53 [Order of submission, March 11, 1932, omitted in printing.]

54 In United States Circuit Court of Appeals, Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE P. ARZNER, APPELLEE

Order directing filing of opinion and filing and recording of judgment

April 4, 1932

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court forthwith in accordance with the opinion filed.

55 In United States Circuit Court of Appeals for the Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE P. ARZNER, APPELLEE

Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Before WILBUR and SAWTELLE, Circuit Judges, and ST. SURE, District Judge

Opinion

Filed April 4, 1932

WILBUR, Circuit Judge:

During the life of a ten-thousand dollar war risk insurance policy the insured, Clarence P. Arzner, appellee, was totally and permanently disabled. Premiums were paid therefor until January, 1919. On March 1, 1920 the insured reinstated and converted his insurance to an ordinary life contract upon which he paid the premiums. On

February 28, 1921, plaintiff requested that this policy be reduced to $5,000, and that he paid the cash surrender value for the $5,000 insurance which he discontinued. In pursuance of this request he was paid $45.20, representing the cash surrender value of the $5,000 insurance surrendered by him at that time. Thereafter he surrendered the balance of $5,000 and was paid the cash surrender value thereof ($18.30). It is contended by the government on this appeal that inasmuch as the insured had surrendered his reinstated insurance for the cash surrender value thereof, he could not take advantage of the act of Congress of July 3, 1930, amending §307 of the World War veterans' act so as to permit a holder of subse-
56 quent veterans insurance policies to sue upon an original contract. The reason advanced is that the veteran having elected to surrender his subsequent policies for the cash surrender value was not in a position to surrender his subsequent contract or policy as required by the amendment to §307 of July 3, 1930. That amendment is as follows:

"* * * provided that the insured under such contract or policy (all contracts or policies of insurance heretofore or hereafter issued) may, without prejudicing his rights, elect to make claim to the jury or bring suit under Section 445 of this title on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy. Provided further that this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance." 38 U. S. C. A. §518.

The purpose of this amendment was to meet the situation that had arisen by reason of numerous holdings of the courts to the effect that the subsequent veterans' insurance policies were novations, and that, thereafter, recovery could not be had upon the original insurance and that the ordinary principles of contract applied to the veterans' policies. Stevens v. U. S., 29 F. (2d) 904; U. S. v. Buzard, 33 F. (2d) 883; U. S. v. Kusnierz, 33 F. (2d) 887; U. S. v. Allen, 33 F. (2d) 888; U. S. v. Cross, 33 F. (2d) 887; U. S. v. Barker, 36 F. (2d) 556; U. S. v. Andrews, 43 F. (2d) 80; U. S. v. Crowell, 48 F. (2d) 475. The obvious purpose of the amendment was to permit the veteran to present to a court and jury his claim that he was totally and permanently disabled during the life of his War Risk Insurance policy and to provide that if his contention was sustained by the court and jury he should recover under the terms of the original contract notwithstanding the fact that in the subsequent dealings with the veterans bureau he had accepted some form of insurance in lieu of the original war-risk insurance. By this legislation he was not required to jeopardize his rights under the subsequent contracts or policies in order to present his claim under the superseded war-risk insurance. He could completely ignore the subsequent policies. They constituted no defense. If the

judgment was in his favor in his suit on the original policy, however, he was required to surrender any subsequent contract or policy before he was entitled to payment under the prior contract or policy.

These provisions in favor of the veteran were very liberal and definitely and purposely abrogated the rules relating to civil contracts ordinarily applicable to insurance policies. By this legislation the government not only waived its immunity from suit but also waived the defenses which might have been advanced by an insurance company. This was in the interest of justice for where the right of the veteran under his original policy had accrued by reason of his permanent and total disability he was entitled to a monthly payment of $57.50, and there was no reason why, under those conditions, he should be paying premiums upon a policy which entitled him to a payment of that amount if and when he became, as he in fact then was, permanently and totally disabled. The government admits all this, but claims that the veteran by voluntarily surrendering the subsequent policies and accepting their cash surrender value, has put himself in a position where he cannot take advantage of the statute of July 3, 1930, supra, for the reason that he cannot surrender his subsequent contract because he has already done so and received a cash consideration therefor. This view has been sustained by the Circuit Court of Appeals for the tenth circuit in United States v. Andrews, 43 F. (2d) 80.

We are unable to agree to the conclusion reached by the Circuit Court of Appeals of the tenth circuit. We think that the insured, in the case at bar, comes under both the letter and the spirit of the act of July 3, 1930. While that act authorizes the veteran to retain his rights under the subsequent contract notwithstanding he is making a claim on the original and superseded insurance, it requires a surrender of the subsequent contract as a condition precedent not to the recovery of a judgment in his action upon the first policy, but as a condition to receiving the payments adjudicated in his favor by that judgment. If he has already surrendered the policy there is no occasion to surrender it after the judgment, nor is it possible to do so. The fact that he has surrendered it for a paltry consideration which represents the return to him of a portion of the premium which he should never have been required to pay in the first place, does not change the fact that he comes within the letter of the statute in that he has surrendered the
58 subsequent policies. That he comes within the spirit of the remedial legislation of July 3, 1930, supra, seems too clear for discussion. Under the situation the insured has been paying the government, where, upon the facts as found by the jury, the government should have been paying him. It was such conditions that Congress intended to remedy by the legislation.

Furthermore, if there is anything in the surrender of the subsequent policies by the insured which differentiates it from the surrender required to be made by Congress in the amendment of July

3, 1930, supra, it lies in the fact that the surrender was for a cash consideration. The return of that consideration should and would have the same effect as the surrender of the subsequent policies. It is all the veteran can surrender under the circumstances. It is suggested that the government should at least have remitted from the amount of the judgment the amount thus paid to the veteran as the cash surrender value of the subsequent policies. While this claim is not strongly pressed, upon reflection we are satisfied that it is not tenable. It is the purpose of Congress to permit the veteran to ignore the subsequent policies of insurance in maintaining his rights under the original policy. By the verdict of the jury and the judgment of the court, it has been determined that he never should have been required to pay the premiums upon the subsequent insurance policies. In this view of the case the balance is in favor of the veteran rather than the government upon the subsequent policies, that is to say, the premiums he paid are greater than the amount returned to him by way of cash surrender value.

Furthermore, we think the claim of the government set up by way of an affirmative defense alleging the transactions which occurred under and in pursuance of the subsequent policies to be irrelevant to the issues presented to the trial court in the suit upon the original war risk insurance policies. It is the intention of Congress that such suit should be unembarrassed by subsequent transactions between the veteran and the government with relation to renewal or substituted policies. The provision with reference to the surrender of the subsequent policies relate not to the procurement of a judgment but to the right of the insured to payment thereunder. We think the phrase in the amendment of July 3, 1930, supra, "may, without prejudicing his rights, elect to make claim to the jury or bring
59 suit under section 445 of this title on any prior contract or policy, and if found entitled thereto" contemplates a suit upon the original policy unembarrassed by any subsequent transactions with the government upon "any subsequent contract or policy," and that the provision of the amended section with regard to the surrender of the subsequent contract is a condition subsequent which must be complied with in order to secure payment from the veterans bureau of the installments provided for in the judgment. The application for and the acceptance of such cash surrender payments in the light of the law would no doubt be effective to surrender any rights which the veteran might have under these subsequent contracts of insurance. The actual physical surrender of the documents and formal assent to such surrender, would no doubt be desirable and might well be insisted upon as a condition of payment. In any event, it is sufficient to say and to hold that the affirmative defense interposed by the government in the case at bar is not germane to the veteran's cause of action. This view is in accord with our decision in Herrig v. U. S., 53 F. (2d) 327, where this court, speaking through Judge Sawtelle, said:

"We believe that, under a recent statute, the defense of estoppel by virtue of reduced, converted, or reinstated policies is not open to the Government, and therefore the equitable matter set up by the plaintiff-appellant in reply to such defense, and the court's decree thereon, were of no legal effect, and constitute a futile and unnecessary gesture. That being so, the action at law on the original policy of insurance, which action was triable only before a jury, was the only cause that could be properly and was adjudicated in the court below. As to this cause, the jury found for the defendant, judgment was rendered on the verdict, and there is no reason why such verdict and judgment should be disturbed by this court."

To the same effect is the decision of the Circuit Court of Appeals of the fifth circuit in Sprencel v. United States, 47 F. (2d) 501, 504. Speaking of this remedial legislation of July 3, 1930, supra, the court said:

"If a recovery is had on the old policy or contract, then
60 before receiving payment under such a judgment, the insured is required to surrender any subsequent agreement. In other words, it seems to permit him to elect whether he will claim upon the original policy 'without prejudicing his rights' and submit the issues of fact and law as to whether he is entitled to recover thereunder, notwithstanding any subsequent contract or policy. Since it is our conclusion that the lower court erred (for reasons which later hereinafter appear) in directing a verdict and will reverse the case for a new trial, we think it well to say that this statute will hereafter exclude from the litigation any question of estoppel based upon the application for reinstatement and the alleged contract arising therefrom.

"Accordingly, we hold in the present suit that, as in the Sprencel case, supra, the question of estoppel raised by the Government should have been 'excluded from the litigation.' This being so, the equitable matter set up by the plaintiff in its reply presented no issue properly cognizable by the court below, and the decree entered upon such issue is of no legal effect."

Inasmuch, however, as the appellee has not claimed either in the court below nor in this court, that the defense is irrelevant, we have passed upon the merits of the issue presented to us, namely, whether or not the surrender of the subsequent policies for the cash surrender value thereof, precludes the veteran from receiving the payments provided for in the original War Risk Insurance policy in the event that he became totally and permanently disabled during the life of the policy.

Judgment affirmed.

[File endorsement omitted.]

61 In United States Circuit Court of Appeals for the Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT
vs.
CLARENCE P. ARZNER, APPELLEE

Judgment

Filed April 4, 1932

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

62 In United States Circuit Court of Appeals

[File omitted.]

Order staying issuance of mandate

Filed April 15, 1932

Upon application of Mr. Anthony Savage, United States attorney, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this court in the above cause be, and hereby is, stayed to and including May 31, 1932; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, April 15, 1932.

[File endorsement omitted.]

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 36888. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 191. The United States of America, petitioner, vs. Clarence P. Arzner. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1932. File No. 36888.

U. S. GOVERNMENT PRINTING OFFICE: 1932